Kentucky Law Journal

Volume 41 | Issue 2 Article 8

1952

Freedom of Speech and Motion Pictures--The "Miracle" Decision

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by the courts. In *Clinard* v. *City of Winston Salem*[23] the North Carolina court answered the question in the negative. There appears to have been only one other case[24] involving the inclusion in a general zoning plan of one provision for segregation. The court there also held the ordinance unconstitutional. While this question has never been directly decided by the Supreme Court of the United States it would appear, in view of the widespread application of the holding in the *Buchanan* case, that the court would merely declare the segregation provision unconstitutional while leaving the remainder of the ordinance substantially intact. It is submitted that this would be a fundamentally sound result.

The author was unable to discover cases in the remainder of the seventeen southern states having segregation by law, and it is, therefore, assumed that if the question has arisen in those states it has never been adjudicated by a court of last resort.

In view of the foregoing discussion it is now manifest that all ordinances contemplating segregation of the races as to places of abode are unconstitutional. Such legislation exceeds the proper exercise of the police power and in its purpose is clearly violative of the Fourteenth Amendment to the United States Constitution.

Any theory of promotion of the public peace and welfare by prevention of racial conflicts is overridden by the serious infringement of property interests. The courts contend that regardless of what may be argued in support of segregation legislation in other contexts and its application in particular to education, it will not apply to legislation of this variety wherein persons are clearly deprived, without due process of law, of their constitutionally guaranteed privilege of disposing of property.

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FREEDOM OF SPEECH AND MOTION PICTURES— THE "MIRACLE" DECISION

In *Burstyn* v. *Wilson*,[1] the Supreme Court of the United States for the first time was presented squarely with the question: Are motion pictures within the ambit of protection which the First Amendment, through the Fourteenth Amendment, secures to any form of speech or the press? The question was answered in the affirmative and a

[23] 217 N. C. 119, 6 S.E. 2d 867 (1940).
[24] Bowen v. City of Atlanta, 159 Ga. 145, 125 S.E. 199 (1924).
[1] 72 Sup. Ct. 777 (1952).

37 year-old anomaly in Constitutional Law—based on an application of a state constitution—was thereby abandoned. Prior to this decision, freedom of expression in newspapers, books, and magazines was protected from abridgement, but it was not protected in motion pictures.

The source of this inconsistency was a case decided during the early history of the film industry, *Mutual Film Corp.* v. *Industrial Commission of Ohio*,[2] in which an Ohio statute was attacked as being violative of the Ohio constitutional guaranty of a free press.[3] The statute, providing for a board of censors to approve for showing only such films "as are of a moral, educational, or amusing and harmless character," was held valid on the basis that motion pictures were not a part of the press, and therefore, were not subject to constitutional protection.[4] In view of the fact that at the time of this decision, "talking pictures" were eleven years in the future, it is not hard to rationalize the holding, the foundation of which rested heavily on the belief that "entertainment" did not warrant the protection extended to speech and the press.[5] With the advent of the sound track, and the subsequent development of the film industry, the holding made less sense, but has remained the law until 1952, apparently because of the reluctance of the movie industry to risk the boomerang effect of a fresh, similar holding.[6] Over the years though, changes in constitutional law developed which strongly indicated that the judicial attitude toward motion pictures had changed.

In 1925, the Court assumed without discussion that the freedom of speech guaranteed by the First Amendment is among the fundamental, personal liberties safeguarded from invasion by state action by the due process clause of the Fourteenth Amendment.[7] In 1948, the Court repudiated the entertainment-information dichotomy, *i.e.*, the belief that entertainment, as distinguished from information, is not a form of expression which comes within the protection extended to speech and the press, when it said:

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[2] 236 U.S. 230 (1915).

[3] Complainant also contended that the statute was an unlawful burden on interstate commerce, and that it attempted to delegate legislative power to censors. These arguments were rejected.

[4] Complainant had contended in Federal District Court that the statute was a violation of the First and Fourteenth Amendment, but the District Judge held that the first eight Amendments to the U.S. Constitution were not restrictions against state action. Consequently the contention was abandoned at the Supreme Court level.

[5] "We immediately feel that the argument is wrong or strained which extends the guaranties of free opinion and speech to the multitudinous shows which are advertised on the bill-boards of our cities and towns. . . ." McKenna, J., in Mutual Film Corp. v. Industrial Commission of Ohio, 236 U.S. 230, 243 (1915).

[6] This theory was suggested in 49 YALE L. J. 87 (1939).

[7] Gitlow v. New York, 268 U.S. 652 (1925).

> "The line between the informing and the entertaining is too elusive for the protection of that basic right [a free press]. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine."[8]

The strongest evidence of a change in the Court's attitude was another 1948 case in which the Court said:

> "We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment."[9]

This statement, however, had effect only as an indication of the Court's opinion, because as pointed out by the Court the issue had only a remote bearing, if any, on the case involved.

The time was ripe for a new challenge of the validity of state statutes setting up censorship boards to approve films, when the Board of Regents of New York banned a film entitled "The Miracle" on the ground that it was "sacrilegious". The action was taken under a statute providing that the director of the motion picture division of the education department "shall cause to be promptly examined every motion picture film submitted to them as herein required, and *unless* such film or a part thereof is obscene, indecent, immoral, inhuman, *sacrilegious,* or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefore." (Italics writer's.) The distributor of "The Miracle" brought an action to review the determination of the Regents, claiming that the statute violated the Fourteenth Amendment as a prior restraint upon freedom of speech and the press, and that the term "sacrilegious" was so vague and indefinite as to offend due process.[10] The New York Court of Appeals affirmed the order of the Appellate Division rejecting the distributor's contentions.[11] On appeal to the Supreme Court it was held that motion pictures are within the protection of the First Amendment, and that being within that protection, a state may not ban a film on the basis of a censor's conclusion that it is sacrilegious.

This holding rested on two grounds. In the majority opinion, it was declared that the state has no legitimate interest in protecting any or all religious views from attack sufficient to justify a prior restraint on the press.[12] Justice Frankfurther, in a learned concurring

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[8] Winters v. New York, 333 U.S. 507, 510 (1948).

[9] United States v. Paramount Pictures Inc., 334 U.S. 131, 166 (1948).

[10] It was also claimed that the statute was invalid as a violation of the guaranty of separate church and state under the Fourteenth Amendment. This contention was not considered by the Supreme Court.

[11] Joseph Burstyn v. Wilson, 303 N. Y. 242, 101 N.E. 2d 665 (1951).

[12] The state has no interest in protecting religious views from attack as such, but this does not preclude an interest if the attack is so vituperative as to cause

opinion, pointed out the uncertainty of the meaning of the word sacrilegious, and held that the statute therefore violated due process for want of an objective standard. It did not sufficiently apprise those bent on obedience of law of what could reasonably be foreseen to be found illicit by the law-enforcing authority, and made judicial review inoperative.

The question which now arises is: How much power is left to the states to control the showing of motion pictures, either by banning the whole or by deleting parts of a film before a public showing, or by subsequent criminal prosecution of those who show a motion picture deemed to be an abuse of the liberty of the press? That some measure of control is left after the present case was made clear by the Court when it said:

> "To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and at all places."[13]

Again in the opinion the Court said:

> "Since the term 'sacrilegious' is the sole standard under attack here, it is not necessary for us to decide, for example, whether a state may censor motion pictures under a clearly-drawn statute designed and applied to prevent the showing of obscene films."[14]

It is not clear, however, what the limits of permissible control may be. Court decisions based on past statutes allowing the banning of motion pictures cannot serve as guides since their validity did not depend on their being constitutional exercises of the states' limited control over a free press. Allowable control over media of expression

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actual violence. In Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942), D was arrested for cursing an officer while on a mission "to preach the true facts of the Bible." In sustaining the conviction the Court said: "But even if the activities of the appellant which preceded the incident could be viewed as religious in character, and therefore entitled to the protection of the Fourteenth Amendment, they would not cloak him with immunity from the legal consequences for concomitant acts committed in violation of a valid criminal statute." In Terminiello v. City of Chicago, 337 U.S. 1, 33 (1948), D's conviction was reversed because of a technicality in the record, (See footnote 24 *infra*) but Justice Jackson in a dissenting opinion pointed out: "Religious, social and political topics that in other times or countries have not been open to lawful debate may be freely discussed here. Because a subject is legally arguable, however, does not mean that public sentiment will be patient of its advocacy at all times and in all manners. . . . Hence many speeches, such as that of Terminiello, may be legally permissible but may nevertheless in some surroundings be a menace to peace and order. When conditions show the speaker that this is the case, as it did here . . . he cannot indulge in provocations to violence without being answerable to society."

[13] Burstyn v. Wilson, 72 Sup. Ct. 777, 781 (1952).

[14] *Id.* at 782-783.

which have been protected by the First and Fourteenth Amendments should give some indication as to the extent to which films can be controlled. But, as pointed out by the Court in the present case:

> ". . . nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems."[15]

Unless the "peculiar problems" of expression through motion pictures distinguish them considerably from other forms of expression, the present decision will radically limit the controls heretofore exercised by the states.[16] The most effective control over motion pictures has been censorship. Though the constitutional guaranty of free speech has never been considered absolute, if it approaches the absolute, it does so as to previous restraints, the most common example of which is censorship. Only a few attempts by the states to exercise previous restraints over speech or the press have been allowed to succeed, and the Court has exhibited its feeling of hostility towards this type of control again and again.[17] There have been, however, several indications in the language of the cases that previous restraints would be allowed to stand in certain narrowly limited classes of speech. In *Near* v. *Minnesota,* a case involving an unconstitutional restraint on newspapers, the Court said:

> ". . . the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases. 'When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court would regard them as protected by any constitutional right.' . . . No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government."[18]

This list of exceptions to immunity to prior restraint is not necessarily inclusive; on the other hand cases have not been found to show conclusively that all of the exceptions, for example, advocacy of the

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[15] *Id.* at 781.

[16] One of the chief arguments interposed for movie censorship is that the audience is largely made up of adolescents. In answering this argument in the present case, the Court said that this might figure in determining the permissible scope of censorship, but was no justification for unbridled censorship. On this score, CHAFEE, FREE SPEECH IN THE UNITED STATES 543 (1941), has suggested that instead of making all photoplays suitable for children, it might be better to exclude children from certain plays.

[17] For examples of this hostility, see Near v. Minnesota, 283 U.S. 697 (1931); Schenck v. United States, 249 U.S. 47 (1919).

[18] Near v. Minnesota, 283 U.S. 697, 716 (1931).

forceful overthrow of the government, would be allowed to stand if imposed in the form of censorship.[19]

Of these possible exceptions to the state's inability to impose a prior restraint, obscenity will probably have the widest application to motion pictures. Under a properly drawn statute, there is little reason to believe that films cannot continue to be subject to censorship for the prevention of obscenity. Such a statute, to succeed, will have to be narrowly drawn, with limited standards of applicability such as obscene, lewd, indecent, or other words which have been defined by the courts and have to some extent the same meaning in the minds of different people.[20] Catch-all phrases like "of such character as to be prejudicial to the best interests of the people" will have to be excluded.[21] It has been phrases like this that have made it possible for censors in the past to ban films when the only objection to them has been that they espouse social or political beliefs inconsistent with their own.[22] Similar wording in statutes controlling constitutionally protected speech or publications has repeatedly been struck down by the Court because such broad language vests discretionary power in the officials administering the statute, allowing them to determine arbitrarily what can or cannot be spoken or published.[23] Once a

[19] There has long been no doubt, however, that such advocation can be made a crime. Gitlow v. New York, 268 U.S. 652 (1925); Whitney v. California, 274 U.S. 357 (1927); Dennis v. United States, 341 U.S. 494 (1950).

[20] The traditional instruction as to what is obscene has been "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." Regina v. Hicklan, L. R. 3 Q. B. 360, 371 (1868). This test has been replaced in the federal courts by an instruction ". . . whether a publication, taken as a whole, has a libidinous effect." United States v. One Book Entitled Ulysses, 72 F. 2d 705, 707 (2d Cir. 1934). Followed by Parmellee v. United States, 113 F. 2d 729 (D. C. Cir. 1940).

[21] Gelling v. Texas, 72 Sup. Ct. 1002 (1952) citing the principal case Burstyn v. Wilson, 72 Sup. Ct. 777 (1952) held a Texas censorship statute containing this phrase unconstitutional.

[22] In *Motion Picture Censorship—The Memphis Blues,* 36 CORNELL L. Q. 273, 275-276 (1951) there appears an example, *inter alia,* of censors in action in Memphis. A motion picture, "Curley," after being passed by at least nine other censorship boards came to Memphis. The picture was a variation of the "Our Gang" comedies. A pretty school teacher is expected by her pupils to be stern, but she gradually wins the affection of the children by her athletic prowess. The Memphis censors were unable to approve the picture "with the little Negroes as the South does not permit Negroes in white schools nor recognize social equality between the races even in children."

[23] For example, see Kunz v. New York, 340 U.S. 290 (1950) where a statute which denied the right to preach on the streets without previously obtaining a permit from the police commissioner was held invalid, because it was within the commissioner's discretion whether or not to issue a permit without any appropriate standards to guide him. Or, see Lovell v. Griffin, 303 U.S. 444 (1938), where a local ordinance imposing a fine against anyone distributing pamphlets of any kind without first obtaining permission from the city manager was held invalid as an unlawful restraint on a free press. In Kovacs v. Cooper, 336 U.S| 77 (1949) a local ordinance prohibiting the use of sound trucks which emit "loud and raucous" noises on the public street was held not to violate free speech. A similar statute,

statute is set up, the courts in applying it will have to keep disputes limited to the narrow confines of the statute.[24]

Because of the disrepute in which the Supreme Court holds previous restraints on free speech and the press, it is doubtful whether censorship for any purpose other than to prevent obscenity will be permissible. The cases generally have restricted prior restraints to the exercise of nondiscriminatory police powers in regulating phases of government which indirectly affect a prior restraint on speech or the press.[25] However, many attempts to regulate speech or the press have failed because they were not limited to specific acts, or because they allowed the use of discretion in their administration, so that it is difficult to determine how much restraint a properly drawn statute might be allowed to impose. Possibly censorship of motion pictures can be extended to prevent the showing of films which tend to incite acts of violence.[26] If it can, the danger of violence will have to be substantial, and it might be limited to motion pictures which encourage an actual breach of the law.[27]

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except that sound trucks were allowed if prior permission were obtained from the chief of police was held invalid since it was within the chief's discretion to deny a permit. Saia v. New York, 334 U.S. 558 (1948). For a suggested method of administration of censorship of books and plays which could as well apply to photoplays, see CHAFEE, FREE SPEECH IN THE UNITED STATES, 534-540 (1941).

[24] A local ordinance provided, "all persons who shall make, aid, countenance, or assist in making any . . . disturbance, breach of the peace . . . shall be deemed guilty of disorderly conduct." D was arrested after speaking in an auditorium, referring to a crowd outside as filthy scum, and denouncing Zionist Jews, causing the crowd in their anger to heave bricks through the auditorium windows. The trial court instructed that breach of the peace consisted, *inter alia*, of any misbehavior which violates the public peace by stirring the public to anger, incites disputes, or brings about a condition of unrest. Held by U.S. Supreme Court, reversing conviction: As construed, the statute is unconstitutional. It was not narrowly confined to "fighting words" or some limited type of speech properly punishable, but included creating unrest, inviting dispute. Terminiello v. Chicago, 337 U.S. 1 (1948).

[25] Milkwagon Drivers Union of Chicago v. Meadowmoor Dairies, 312 U.S. 287 (1941) (injunction against picketing where violence was employed); Breard v. Alexandria, La., 341 U.S. (1951) (prohibition of door to door solicitation at private homes without previous consent of the homeowners); Cox v. New Hampshire, 312 U.S. 569 (1941) (prohibition of parades without first obtaining permit which evidence showed would issue as a matter of course); Kovacs v. Cooper, 336 U.S. 77 (1949) (prohibition of the use of sound trucks on the city streets).

[26] That previous restraint for such purposes would be permissible is implied in Near v. Minnesota, 283 U.S. 697 (1931); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[27] In Winters v. New York, 333 U.S. 507 (1948) a statute as construed by the state Court of Appeals which prohibited distribution of a magazine principally made up of news or stories of criminal deeds of bloodshed or lust, so massed as to become vehicles for inciting violent and depraved crimes against a person was held by the Supreme Court to be invalid because it was so vague and indefinite as to violate the Fourteenth Amendment by prohibiting acts within the protection of the guaranty of free speech and press. In an earlier case, Fox v. Washington, 236 U.S. 273 (1914), the Supreme Court held valid a similar statute on the ground that it was interpreted by the state court as being confined to acts which encourage an actual breach of the law.

Almost as effective as censorship is another method for controlling offensive speech or publications—subsequent punishment for what is deemed to be an abuse of the liberty. Punishment, especially if it is a jail sentence, indirectly imposes a future prior restraint, but the Court still looks upon it as much less offensive than censorship.[28] Since punishment is less offensive, any evil which could be censored out of a picture could certainly, if shown on the screen, serve as a ground for punishment as an abuse of freedom of the press. Besides for obscenity or incitements to a breach of the peace, criminal convictions have been allowed, *inter alia,* for hindrance of the war effort,[29] advocacy of the forceful overthrow of the government,[30] and criminal libel.[31] In short, a state may punish any utterance or publication inimical to the public welfare which amounts to a serious abuse of the freedom of speech or the press.[32] But statutes providing punishment for expression in motion pictures also will now have to pass constitutional tests.

The calibre of present-day motion pictures is high enough that few films should fall within the limits of governmental control. The voluntary industry code now governing American made films certainly prohibits all that a state can constitutionally prohibit. The significant point which the present decision wins for the film industry is what the states cannot prohibit. For example, it will no longer be legally possible for censors to ban a motion picture that strikes at a persistent prejudice simply because the censor happens to be of the group at which the film is aimed. This does not necessarily mean that complete freedom of expression will follow as an inevitable result of the decision. The states' limited power to censor or punish, if abused by over-zealous administrative officials, can still restrain this freedom, especially if the power is leveled at those who cannot afford the expense of contesting particular rulings, or of forcing the issue when possible punishment is threatened. But the decision in the present case is the necessary first step. How free expression by motion pictures is in the future depends largely on the vigilance of the film industry in demanding that its new rights be observed.

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[28] Indeed an early case expressed some doubt that the First Amendment pertained to anything but previous restraint. "It may well be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints . . ." Schenck v. United States, 249 U.S. 47, 51 (1919).

[29] Schenck v. United States, 249 U.S. 47 (1919); Abrams v. United States, 250 U.S. 616 (1919).

[30] See note 19 *supra.*

[31] Beauharnais v. Illinois, 343 U.S. 250 (1952).

[32] Gitlow v. New York, 268 U.S. 652 (1925).